91-754

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HOME BOX OFFICE, INC., *et al.*,
Petitioners,

v.

Z CHANNEL LIMITED PARTNERSHIP,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a plaintiff can avoid dismissal of its moot claim for declaratory and injunctive relief by raising a new claim for damages on appeal.

LIST OF PARTIES

The parties to the proceedings below were petitioners Home Box Office, Inc., MGM/UA Telecommunications, Twentieth Century Fox Film Corp., and Warner Bros. Inc., and respondent Z Channel Limited Partnership. Paramount Pictures Corporation was also named with petitioners, but was dismissed prior to the Ninth Circuit's decision.

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v.

Z CHANNEL LIMITED PARTNERSHIP,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Home Box Office, Inc., MGM/UA Telecommunications, Twentieth Century Fox Film Corp., and Warner Bros. Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceedings on April 30, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 931 F.2d 1338 and is reprinted in the appendix hereto, *infra* p. 1a.

The order of the United States District Court for the Central District of California (Real, J.) granting petitioners' motion for summary judgment is unreported and is reprinted in the appendix hereto, *infra* p. 32a.

JURISDICTION

Respondent brought this action in the Central District of California, alleging violations of the Sherman Act, 15 U.S.C. § 1, and California law. The district court's jurisdiction was based on 28 U.S.C. §§ 1331, 1337, 2201, and 2202. On October 17, 1988, the district court entered final summary judgment in favor of petitioners. (App. 32a). Respondent filed a timely notice of appeal on October 19, 1988. Appellate jurisdiction was based on 28 U.S.C. § 1291.

On April 30, 1991, a sharply divided Ninth Circuit panel reversed the grant of summary judgment. (App. 1a). Judge Canby wrote the majority opinion, joined by Judge Thompson. Judge Kozinski filed a strongly worded dissent. Petitioners filed a petition for rehearing with suggestion for rehearing en banc on May 14, 1991. On August 5, 1991, the Ninth Circuit denied that petition. (App. 31a).

This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Rule 8(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> **Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain ... (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Fed. R. Civ. P. 8(a).

Rule 54(c) of the Federal Rules of Civil Procedure provides:

> **Demand for Judgment.** A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

Id. 54(c).

STATEMENT OF THE CASE

Over a strong dissent, a panel of the Ninth Circuit held that a plaintiff can avoid dismissal of its moot claim for declaratory and injunctive relief by raising a new claim for damages on appeal. That holding expands federal jurisdiction beyond Article III limits and departs from this Court's "established practice" of dismissing moot claims. The majority opinion below also ignores the well-settled rule that claims may not be raised for the first time on appeal, defies the Federal Rules of Civil Procedure, and places the Ninth Circuit in direct conflict with every other circuit that has considered this issue. The rule in the First, Fifth, Sixth, Seventh, and Eleventh Circuits is to the contrary.

As Judge Kozinski recognized in dissent, the Ninth Circuit's new rule will vastly expand federal jurisdiction, will multiply the amount of work federal courts must do, and will ill-serve "the cause of sound judicial administration." (App. 20a) (Kozinski, J., dissenting). Because of the far-reaching consequences of the Ninth Circuit's new

rule, petitioners respectfully request that this Court grant certiorari.

The Underlying Dispute

For many years, Z Channel was a pay cable television service that exhibited movies. Z Channel licensed some of the movies from petitioners. The license agreements precluded Z Channel from showing the movies covered by the licenses if Z Channel also showed paid advertisements. (App. 6a-7a). Z Channel favored this restriction when it entered into the licenses, because the restriction allowed subscriber-supported cable television services — like Z Channel — to exhibit recently-released movies before the movies would be made available for exhibition on commercial broadcast networks and advertiser-supported cable channels.

But Z Channel was later sold to American Spectacor, which altered Z Channel's format to one "that mixed movies and sports," and included paid advertisements. (App. 7a). This format would have violated the license agreements. (*Id.*). Thus, each of the petitioners objected.

District Court Proceedings

In April 1988, Z Channel brought this action. In count I, Z Channel alleged that petitioners, in violation of section 1 of the Sherman Act, had conspired "by interpreting and applying their respective license agreements in a manner as to prevent Z Channel from advertising." (Second Amended Complaint ¶ 41). The only relief sought in connection with count I was declaratory and injunctive relief, permitting Z Channel to show movies and paid advertisements. (App. 8a, 9a).

Based on the same supposed conspiracy, count II alleged "a group boycott, also in violation of section 1 of the

Sherman Act, and sought declaratory and injunctive relief as well as damages." (App. 8a-9a). Z Channel also alleged state law claims for which it sought damages.

Z Channel twice amended its complaint to add or change plaintiffs. But in each case, Z Channel left its alleged claims unchanged.

After discovery, petitioners moved for summary judgment. Z Channel abandoned count II, its "boycott" claim for damages, because there was no evidence of concerted action. Thus, Z Channel consented to the dismissal of count II with prejudice. (App. 9a). The district court then granted summary judgment as to count I, and also dismissed the pendent state law claims. (*Id.*).

Ninth Circuit Proceedings

Z Channel appealed solely from the district court's grant of summary judgment as to count I, its claim seeking declaratory and injunctive relief. But after filing its appeal, Sportschannel acquired Z Channel and instituted an all-sports format. Because Z Channel "completely stopped showing movies, and does not contemplate showing movies in the future," (*id.*), petitioners moved to dismiss the appeal as moot. The argument on the motion to dismiss was consolidated with the hearing on the merits.

On April 30, 1991, the Ninth Circuit, in a split decision, reversed the district court's summary judgment, after first ruling that Z Channel's action was not moot. The majority recognized that the "only relief" requested by Z Channel in connection with count I "was declaratory and injunctive relief," and that "[b]ecause Z Channel has changed its format and neither shows nor contemplates showing movies, its prayer for declaratory and injunctive relief is clearly moot." (*Id.*). Nevertheless, the majority

permitted Z Channel to assert a claim for damages for the first time on appeal to save its action from dismissal. (App. 10a).

Judge Kozinski filed a vehement dissent, criticizing the majority for improperly "breathing new life" into a case that "is dead." (App. 20a) (Kozinski, J., dissenting). The dissent pointed out that the Ninth Circuit's new rule eviscerates a clear rule of procedure, creates a severe inter-circuit conflict, and, by permitting parties to assert new claims on appeal, will vastly expand federal jurisdiction. (App. 20a, 30a) (Kozinski, J., dissenting).

Petitioners filed a timely motion for rehearing with suggestion for rehearing en banc on May 14, 1991, which was denied on August 5, 1991. (App. 31a).

REASONS FOR GRANTING THE WRIT

I.

THE OPINION BELOW DEPARTS FROM THIS COURT'S "ESTABLISHED PRACTICE" OF DISMISSING MOOT CLAIMS

This Court has repeatedly held that the "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). "The inability of the federal judiciary 'to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' " *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (quoting *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964)). *Accord United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980) (the

doctrine of mootness "limits the business of federal courts").

Simply stated, an action becomes moot, and must be dismissed, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). *See, e.g., Board of License Comm'rs v. Pastore*, 469 U.S. 238, 239 (1985) ("no decision on the merits by this Court can now have an effect" because the appellant "has gone out of business"). As this Court has explained:

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in *the case before it.*

Mills v. Green, 159 U.S. 651, 653 (1895) (emphasis supplied).

"[A]n actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe v. Wade,* 410 U.S. 113, 125 (1973). Thus, when an event renders the relief sought "ineffectual," the "court will not proceed to a formal judgment, but will dismiss the appeal." *Mills,* 159 U.S. at 653. *See also United States v. Munsingwear, Inc.,* 340 U.S. 36, 39-40 (1950) (the "established practice" in dealing with a moot case is to "vacate the judgment below and remand with a direction to dismiss").

This Court has not addressed directly the issue of whether a plaintiff may save a moot claim for declaratory and injunctive relief by seeking damages for the first time on appeal. But whenever this Court has held that a claim for damages can save a case from mootness, the claim for

damages was asserted in the complaint. *E.g., Powell,* 395 U.S. at 496 (the petitioner's "claim for back salary remains viable even though" claims for declaratory and injunctive relief "have become moot"). *Accord Deakins v. Monaghan,* 484 U.S. 193, 201 (1988) (conclusion that the "respondents' equitable claims" are moot does not prevent consideration of the "respondents' claims for monetary relief"); *University of Texas v. Camenisch,* 451 U.S. 390, 393 (1981) ("the case as a whole is not moot" because the respondent's claim for the cost of his sign-language interpreter "remains to be decided").[1]

In determining whether an appeal is moot, this Court has never focused on the claims a plaintiff could have asserted in the district court, but only on "the case before it." *Mills,* 159 U.S. at 653. For example, in *Alejandrino v. Quezon,* 271 U.S. 528, 530, 532 (1926), the petitioner brought an action for injunctive relief, which this Court held had become moot. The Court rejected the argument that there "still remains" an issue as to whether the petitioner had a right to recover his back salary. *Id.* at 533. Because the petitioner's complaint was not "directed" to a claim for back salary, the Court followed its "established practice" and dismissed the action. *Id.* at 533, 535-36.

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[1]Similarly, in *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 459 (1957), cited by the Ninth Circuit below, the case was not moot because the plaintiff's complaint "ask[ed] for back pay for increased workloads." This Court recognized that "to the extent that they sought a monetary award, the case is a continuing controversy." *Id.* The only other Supreme Court case cited by the Ninth Circuit is inapposite. In *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60, 65-66 (1978), mootness was not an issue. The Court merely refused to dismiss a meritorious constitutional claim for failure to seek the proper form of declaratory and injunctive relief. *Id.*

In this case, Z Channel did not seek damages in connection with count I. As Judge Kozinski recognized, "Z Channel never said boo in the district court about damages under count I." (App. 21a) (Kozinski, J., dissenting). In count I, Z Channel sought "declaratory and injunctive relief, to permit Z Channel to show licensed movies along with sports programming that is interspersed with commercials." (App. 9a). But, as the Ninth Circuit recognized, Z Channel subsequently "changed its format and neither shows nor contemplates showing movies." (*Id.*).[2] Because the only relief Z Channel requested has become moot, there is no remaining claim to "supply the constitutional requirement of a case or controversy." *See Powell,* 395 U.S. at 497. As Judge Kozinski eulogized, "[t]his case is dead. R.I.P." (App. 30a) (Kozinski, J., dissenting).

Although the Ninth Circuit determined that the relief requested in count I is "no longer of any use" to Z Channel and that Z Channel's "prayer for declaratory and injunctive relief is clearly moot," (App. 9a-10a), the majority did not follow this Court's "established practice." Rather than dismissing Z Channel's action, it permitted Z Channel to assert a new claim for damages on appeal.[3] But because Z Channel did not raise the issue

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[2]Thus, there is no "reasonable expectation" that Z Channel will "be subjected to the same action again." *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975). The case therefore does not "present[] a question that is 'capable of repetition, yet evading review,'" so far as Z Channel is concerned. *See DeFunis,* 416 U.S. at 318-19.

[3]In dissent, Judge Kozinski criticized the majority for "in effect" granting Z Channel leave to amend its complaint to include a prayer for damages. (App. 23a) (Kozinski, J., dissenting). As Judge Kozinski recognized, the majority, in doing so, improperly "invert[ed] the roles of the trial and appellate courts." (*Id.*) (Kozinski, J., dissenting) (citing Fed. R. Civ. P. 15(a)). But Judge Kozinski pointed out

before the district court, the issue was waived on appeal. *See Singleton v. Wulff,* 428 U.S. 106, 120 (1976) (federal appellate courts should not consider issues not raised below); *Hormel v. Helvering,* 312 U.S. 552, 556 (1941) (same).

II.

THE OPINION BELOW CREATES A CONFLICT BETWEEN THE NINTH CIRCUIT AND EVERY OTHER CIRCUIT THAT HAS CONSIDERED THE QUESTION PRESENTED

The Ninth Circuit's ruling conflicts with the rule followed by *every* other circuit that has considered whether a plaintiff can avoid dismissal of its moot claim for declaratory and injunctive relief by raising a new claim for damages on appeal. At least five circuits — the First, Fifth, Sixth, Seventh, and Eleventh Circuits — have held that a plaintiff cannot raise a new claim on appeal to save its action from dismissal.

In *James Luterbach Constr. Co. v. Adamkus,* 781 F.2d 599, 602 (7th Cir. 1986), the Seventh Circuit held that a plaintiff cannot "avoid mootness" by raising "damages for the first time on appeal." Refusing to "consider [the plaintiff's] prayer for damages because it was not brought before the district court," *id.,* the Seventh Circuit concluded that the plaintiff's action, "which asked only for declaratory and injunctive relief, is moot." *Id.* at 603 (citing cases).[4]

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that Z Channel is "a well-heeled litigant represented by one of the giants of the antitrust bar" and should be "bound by its litigation choices." (*Id.*) (Kozinski, J., dissenting).

[4]One of the cases cited by the Seventh Circuit was *Dan Caputo Co. v. Russian River County Sanitation Dist.,* 749 F.2d 571, 574 (9th Cir.

Similarly, in *H. K. Porter Co. v. Metropolitan Dade County,* 650 F.2d 778, 782-83 (5th Cir. 1981), the Fifth Circuit refused to permit a plaintiff to assert a prayer for damages for the first time on appeal and remanded the action to the district court with directions to dismiss the action as moot. The Fifth Circuit recognized that, in the district court, the plaintiff "made no formal attempt to allege damages or any other form of relief that would maintain the controversy. A damage claim, or the existence of any other viable issues in dispute, could have saved this action [for injunctive relief] from mootness." *Id.* at 782 (footnote omitted).[5]

In *Sanchez-Mariani v. Ellingwood,* 691 F.2d 592, 596 (1st Cir. 1982), the First Circuit also refused to permit a plaintiff to "raise[] an eleventh-hour claim for damages"

1984), in which the Ninth Circuit held that the completion of a work contract rendered an unsuccessful bidder's action moot because the bidder "made no plea for damages." *See Luterbach,* 781 F.2d at 603. The opinion below now attempts to distinguish *Dan Caputo,* as well as "two other cases where we [the Ninth Circuit] dismissed appeals because declaratory and injunctive relief had become moot," by noting that in these cases, "there was no indication that damages were sought even as late as appeal." (App. 11a) (distinguishing *Fair v. EPA,* 795 F.2d 851, 854-55 (9th Cir. 1986), and *Enrico's Inc. v. Rice,* 730 F.2d 1250, 1254-55 (9th Cir. 1984)). But until this case, neither the Ninth Circuit nor any other court had even suggested that a party could assert a prayer for damages for the first time on appeal to save an otherwise moot claim.

[5]Because all Fifth Circuit cases decided before October 1, 1981 are binding precedent in the Eleventh Circuit, *see Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Ninth Circuit's opinion also clashes with the law in the Eleventh Circuit. The Ninth Circuit's citation to the Fifth Circuit's earlier decision, *Sapp v. Renfroe,* 511 F.2d 172, 176 n.3 (5th Cir. 1975), is baffling because, as Judge Kozinski noted, the Fifth Circuit "has since revisited the issue and placed itself in line" with the other circuits. (App. 22a n.2) (Kozinski, J., dissenting) (citing *Porter*).

to avoid mootness. Because the plaintiff did not raise the issue of damages before the district court, the First Circuit held that her action for declaratory and injunctive relief was moot. *See id.*[6]

Finally, in *Altec Indus., Inc. v. Weinberger,* 791 F.2d 931 (6th Cir. 1986) (text of opinion only available on LEXIS), the Sixth Circuit dismissed the plaintiff-appellant's appeal because the relief it requested in the district court was moot. "Since plaintiff-appellant sought only declaratory and injunctive relief and not damages, its claim is moot." *Id.* (citing *Luterbach* and *Porter*).

The opinion below ignores these cases. As the dissent recognized, the Ninth Circuit "creates a conflict without so much as a nod to our sister circuits." (App. 22a) (Kozinski, J., dissenting).

III.

THE OPINION BELOW CREATES A CONFLICT BETWEEN RULE 8(a)(3) AND RULE 54(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE

The Ninth Circuit's opinion not only creates an inter-circuit conflict, it eviscerates Rule 8(a)(3) of the Federal Rules of Civil Procedure. In dissent, Judge Kozinski recognized that "[t]he Federal Rules of Civil Procedure are clear as mountain spring water: All complaints must include 'a demand for judgment *for the relief the pleader seeks.*' " (App. 20a) (Kozinski, J., dissenting) (quoting

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[6] *Accord Ainsworth Aristocrat Int'l Pty. Ltd. v. Tourism Co.,* 818 F.2d 1034, 1039 & n.27 (1st Cir. 1987) (when prospective relief is moot, an action "request[ing] only a declaratory judgment and an injunction" must be dismissed "because no appropriate relief could be granted") (citing *Luterbach*).

Fed. R. Civ. P. 8(a)(3)). Because Z Channel's complaint does not demand money damages, but "seeks only declaratory and injunctive relief, neither of which can now be granted," Judge Kozinski concluded, "[t]here's nothing left; we must dismiss." (*Id.*) (Kozinski, J., dissenting).

In reaching the contrary conclusion, the majority ignored Rule 8(a)(3), and focused entirely on Rule 54(c), which provides that a "final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Fed. R. Civ. P. 54(c). But here, there can be no final judgment in favor of Z Channel, because the only claim for relief Z Channel requested is, as the majority acknowledged, "clearly moot." (App. 9a).

Judge Kozinski's analysis is unanswerable:

> [M]y colleagues are looking at the wrong end of the elephant. Fed. R. Civ. P. 54(c) governs final judgments; parties who have litigated a case to completion are entitled to all available relief. Rule 54(c) only applies, however, *after* the case has been fully litigated; it says nothing about what a plaintiff must put in its complaint in order to get to judgment. That issue is governed by Rule 8(a)(3), which has a much lower number because it comes into play long before Rule 54(c). If plaintiff does not satisfy Rule 8(a)(3) by stating a claim for available relief, it never gets to Rule 54(c).

(App. 20a-21a) (Kozinski, J., dissenting).[7]

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[7] Similarly, the Declaratory Judgment Act provides that "[f]urther necessary or proper relief *based on a declaratory judgment or decree* may be granted." 28 U.S.C. § 2202 (emphasis supplied). The Act follows the "general rule that courts have the power to administer supplemental relief to give effect to their judgments or decrees,

As Judge Kozinski concluded, the majority's construction of Rule 54(c) has rendered Rule 8(a)(3) "meaningless." (App. 21a) (Kozinski, J., dissenting). According to the dissent, "[i]f Rule 54(c) automatically cures any and all failures to state a prayer, Rule 8(a)(3) becomes nothing more than friendly advice. It is, of course, totally inappropriate to construe two parts of a statute — or two rules of civil procedure — so that one will cancel out the other." (*Id.*) (Kozinski, J., dissenting) (citations omitted). *See United States v. Menasche,* 348 U.S. 528, 538-39 (1955) (courts have a "duty" to give effect to all provisions of a statute "rather than to emasculate an entire section"); *see also South Carolina v. Catawba Indian Tribe, Inc.,* 476 U.S. 498, 510 n.22 (1986) (same). But the opinion below has done just that.

IV.

SUPREME COURT REVIEW IS NECESSARY TO RESOLVE THE INTER-CIRCUIT CONFLICT AND TO PREVENT A VAST EXPANSION OF FEDERAL JURISDICTION

As discussed above, the Ninth Circuit's decision in this case evidences apparent confusion as to this Court's admonishment against reviewing moot claims as well as the relationship between Rule 8(a)(3) and Rule 54(c) of the Federal Rules of Civil Procedure. The Ninth Circuit held that courts may not dismiss an action seeking only declaratory and injunctive relief when such relief "is

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and the declaratory judgment is no exception." 6A James W. Moore, *Moore's Federal Practice* ¶ 57.10, at 57-78 (2d ed. 1991). But in this case, Z Channel's prayer for a declaratory judgment is moot. Thus, an award of damages "to give effect to" the declaratory judgment is not possible.

clearly moot" if the plaintiff, on appeal, decides to assert a prayer for damages. Supreme Court review is necessary because the Ninth Circuit's opinion creates a major split among the circuits.

Supreme Court review is also necessary because the opinion below would expand federal jurisdiction beyond Article III limits. Because claims for damages "automatically avoid mootness," 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3533.3, at 262 (1984), the Ninth Circuit has made it nearly impossible to dismiss moot actions. Appellate courts are now powerless to dismiss a moot action, without looking beyond what was alleged or presented to the district court. According to the Ninth Circuit, appellate courts must now work with the parties to rewrite their pleadings, and to develop new theories or additional claims for relief to save moot actions from dismissal.

The opinion below misapprehends the function of an appellate court and will multiply the amount of work federal courts must do.[8] As Judge Kozinski recognized, the Ninth Circuit has created "a judicial black hole that sucks up productive resources of cosmic proportions." (App. 30a) (Kozinski, J., dissenting). This Court should grant certiorari to clarify the conflict concerning review of moot actions, right the wrong done in this case, and prevent such mistakes in the future.

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[8]As one gauge of the potential consequences of the Ninth Circuit's opinion, a Westlaw search reveals that at least 100 cases or claims have been dismissed as moot by the Ninth Circuit in the past two years alone. Under the Ninth Circuit's new rule, many of these cases might not have been subject to dismissal.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioners Home Box Office, Inc., MGM/UA Telecommunications, Twentieth Century Fox Film Corp., and Warner Bros. Inc. respectfully ask that this Court grant the writ of certiorari, vacate the opinion of the United States Court of Appeals for the Ninth Circuit, and remand for dismissal of the case.

Respectfully submitted,

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Dated: November 4, 1991

No. 88-6576

United States Court of Appeals

FOR THE

Ninth Circuit

D.C. No. CV-88-1633-R

OPINION

Z CHANNEL LIMITED PARTNERSHIP,
Plaintiff-Appellant,

v.

HOME BOX OFFICE, INC.; MGM/UA TELECOMMUNICATIONS, INC.; PARAMOUNT PICTURES CORPORATION; TWENTIETH CENTURY FOX FILM CORPORATION; WARNER BROTHERS, INC.
Defendants-Appellees.

Appeal from the United States District Court for the Central District of California
Manuel L. Real, Chief Judge, Presiding

Argued and Submitted
March 7, 1990 — Pasadena, California

Filed April 30, 1991

Before: William C. Canby, Jr., Alex Kozinski and David R. Thompson, Circuit Judges.

Opinion by Judge Canby. Dissent by Judge Kozinski

SUMMARY

Courts and Procedure

Reversing and remanding a district court grant of summary judgment, the court of appeals held that a pay television service provider's case was not foreclosed by *Newman*, because the anticompetitive activity complained of could have caused injury to competition between the service provider and other cable services.

Appellant Z Channel Limited Partnership and HBO provide pay cable television services. HBO also produces and distributes movies to other cable providers. This lawsuit concerned agreements between Z Channel and its distributors, and between HBO and its distributors, prohibiting Z Channel from displaying paid advertisements. Z Channel argued that the enforcement of those agreements at the insistence of HBO violated antitrust laws. Z Channel charged in Count One of its complaint that the enforcement of and insistence on the various "no-advertising" agreements were unreasonable restraints of trade in violation of the Sherman Act, for which Z Channel sought declaratory and injunctive relief. In Count Two, Z Channel charged that the agreements were the result of a group boycott, also in violation of the Sherman Act, and sought declaratory and injunctive relief as well as damages. Z Channel abandoned Count Two after discovery. The district court granted summary judgment for HBO, holding that *Newman* controlled the disposition of this case. After this appeal was filed, Z Channel completely stopped showing movies, and does not contemplate showing them in the future.

[1] Because Z Channel changed its format and neither shows nor intends to show movies in the future, its prayer for declaratory and injunctive relief under its remaining Count One was clearly moot. However, the court disagreed with HBO that, for this reason, Z Channel's entire

appeal should be dismissed for mootness. The court agreed with Z Channel that it was entitled to seek damages if it succeeds in proving its Count One claim, and that the case therefore was not moot. [2] A case or controversy still existed because the parties were disputing whether enforcement of an insistence on the no-advertising agreements were an unreasonable restraint of trade. If Z Channel prevails, it may recover damages for loss of advertising revenue. Federal Rule of Civil Procedure 54(c) allows the district court to award damages if Z Channel proves facts entitling it to relief even though Z Channel never requested damages. [3] It was clear that Z Channel did not foreclose relief in damages by failing to ask for them in its Count One prayer. Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleading. [4] Z Channel's Count One of its complaint, construed favorably to it, alleged restraints that could have resulted in financial damage to it. The damages remedy was sufficiently before the court to preclude a dismissal for mootness. The court then turned to the merits.

[5] The court concluded that the district court applied *Newman* too broadly, and thus reversed that judgment. [6] The defendants extracted from *Newman* a broad rule that interpretations and applications of contracts that preexist the anticompetitive activity cannot, as a matter of law, cause antitrust injury. [7] While it was true in this case that some competition ended when Z Channel entered contracts to exhibit certain movies on its channel, competition among distributors to rent those movies to Z Channel for cablecasting at the specified times clearly ended with the signing of that contract. Any later conspiracy to enforce that agreement could not cause injury to the competition among distributors for sale of the con-

tracted movies or times. [8] However, this case involved two other forms of competition in existence when the defendants allegedly acted illegally. [9] The competition between cable channels and distributors for the license rights to films was continuing when the distributors were insisting on retaining their "no-advertising" clauses in new licenses, and, more significantly, when HBO was insisting that the other distributors continue to insist upon those clauses in any new licenses they might grant. To the extent that these actions by HBO and the other distributors injured that competition, the requirements of causation and competitive injury to Z Channel had been met. [10] Z Channel also alleged injury to another, more general, area of competition in which it was participating at the time of the alleged antitrust violations — the struggle for competitive viability in the cable television market. [11] The court thought it clear from these allegations that Z Channel was asserting an injury to competition that postdates the anticompetitive activity of which it complained.

[12] However, part of Z Channel's case was that the distributors were not free to relax their restrictions and permit it more vigorously to compete with other cable services, because HBO in its capacity as a competing cable service coerced the distributor defendants to enforce their agreements against Z Channel. This action by HBO and the distributors was the anticompetitive activity of which Z Channel complained. That conduct was clearly capable of causing an injury to the competition between Z Channel and the other cable services, including HBO. [13] The court could not say as a matter of law that there was no triable issue whether HBO's actions, acting upon the distributors, caused competitive injury to Z Channel. [14] The court thus concluded that the case was not foreclosed by *Newman*. However, the court decided

nothing further. It reversed and remanded simply because the district court's conclusion that *Newman* did not control was in error.

Dissenting, Judge Kozinski stated that the case was dead, procedurally as well as substantively. Under the rules, all complaints must include a demand for judgment for the relief the pleader seeks.

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OPINION

CANBY, Circuit Judge:

In this antitrust action, Z Channel Limited Partnership appeals the district court's grant of summary judgment in favor of Home Box Office, Inc., ("HBO") and several movie producer-distributors. Z Channel contends that the district court erroneously interpreted *Newman v. Universal Pictures,* 813 F.2d 1519 (9th Cir. 1987), *cert. denied,* 486 U.S. 1059 (1988), as requiring dismissal. HBO contends that events since the grant of summary judgment

have rendered this case moot. We hold that this case is not moot, and that the district court erroneously applied *Newman*. Accordingly, we reverse and remand.

FACTS and PROCEEDINGS

Z Channel[1] and HBO both provide pay television services over cable to the Los Angeles area. HBO also produces and distributes movies to other cable providers, as do the other defendants. This lawsuit concerns agreements between Z Channel and its distributors, and between HBO and its distributors, prohibiting Z Channel from displaying paid advertisements. Z Channel contends that the enforcement of those agreements at the insistence of HBO violates antitrust laws. The facts, viewed in the light most favorable to Z Channel, the nonmoving party, are as follows.

For several years Z Channel displayed movies, which it acquired through licensing agreements from defendant studios or distributors (including HBO) who hold the copyrights to the titles. The licensing agreements between Z Channel and the defendant distributors were embodied, initially, in "master agreements" which set out the terms and conditions of the licensing of the first movies rented. These master agreements also contemplate a continuing relationship regarding future movie rentals, through subsequent "amendments" or "letter agreements." Each amendment or letter agreement is separately negotiated and signed by the parties but, unless a modification is

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[1]Ownership of Z Channel has changed at least twice in the course of this litigation. The question of who owns Z Channel (and the rights to this litigation) has been presented as an issue of standing in this appeal, but, as indicated below, we remand for further factual findings in that regard. For the purposes of this opinion, we treat the ownership as if it were unchanged.

negotiated, the amendment incorporates by reference the terms of the master agreement. One provision of those master agreements precludes Z Channel from carrying paid advertising during the period for which the movies are licensed.[2]

HBO — as a cable channel — acquires movies from the other defendant distributors in the same manner. In HBO's master licensing agreements with *its* distributors, there is a provision which prohibits those distributors from licensing the same movies to any other cable television channel which carries any paid advertising. Thus, Z Channel's ability to display paid advertising is constrained by two sets of agreements: the "no-advertising" clauses in its master agreements, and the "no-licensing-to-advertisers" clauses in HBO's master agreements.

In early 1988, Z Channel switched to a format that mixed movies and sports, and decided to display paid advertising during its sports segments. Such a format would have violated both sets of agreements prohibiting advertising.

Z Channel attempted to negotiate modifications in its licensing agreements with its distributors to permit paid advertising during sports programming. Apparently, those negotiations were to modify existing licenses and to

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[2]The no-advertising clauses vary in their formulations, and thus in their scope. For purposes of this appeal we assume that they all prohibit advertising completely (during sports broadcasting as well as during movie broadcasting), since that interpretation is the most favorable to Z Channel, the party resisting summary judgment below. The district court, on remand, is not bound by this assumption, of course, and will have to interpret the various contracts, insofar as necessary to resolve the merits of Z Channel's claim.

permit more lenient licenses of future films.[3] Z Channel alleges that it was unsuccessful in those negotiations, at least in part, because HBO insisted that the distributors comply with their no-licensing-to-advertisers agreements with HBO. Z Channel alleges that as a consequence of these events, it was required to show the sports programs (for which it had contracted) without paid advertising, and, further, that HBO cancelled its licensing agreement with Z Channel.

Subsequently, Z Channel brought this action, charging in Count One that the enforcement of and insistence on the various "no-advertising" agreements constituted un-

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[3]The fact that Z Channel was negotiating for licenses for new movies during this time is not pleaded. In fact the complaint seems to indicate that Z Channel is only complaining of interpretation and application of existing licenses for films already licensed. *See* Second Amended Complaint, paras. 41-44. Z Channel first explicitly refers to continuing competition for new movies in its Opening Brief in this appeal. Appellant's Opening Brief at 21 ("[T]he negotiating for and licensing of movies by defendants and Z Channel through licensing agreements and their subsequent amendments is an ongoing competitive process. This process has been taking place up to and through defendants' imposition of their advertising prohibition.").

The evidence provided in opposition to summary judgment, however, indicates that, at least in part, Z Channel was negotiating for licenses for new movies when it was negotiating with the distributors about its ability to broadcast movies and also to broadcast paid advertising. Similarly, the evidence indicates that at least some of the movies licensed to Z Channel before it stopped showing movies were licensed after its attempt to broadcast advertising was frustrated.

We assume as true Z Channel's allegations, even though they are ambiguous on this score, at best. *Newman*, 813 F.2d at 1522 ("In an antitrust action, the complaint need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws.") (citing *Lucas v. Bechtel Corp.*, 633 F.2d 757, 760 (9th Cir. 1980)).

reasonable restraints of trade in violation of section 1 of the Sherman Act, for which Z Channel sought declaratory and injunctive relief. In Count Two, Z Channel charged that the agreements were the result of a group boycott, also in violation of section 1 of the Sherman Act, and sought declaratory and injunctive relief as well as damages. Z Channel also appended state law contract and tort claims, for which it sought damages.

After discovery, Z Channel abandoned Count Two. HBO sought summary judgment as to Count One and the district court granted it, finding that "*Newman* controls" (referring to *Newman v. Universal Pictures*, 813 F.2d 1519 (9th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988)). The district court thus ordered all counts dismissed. After this appeal was filed, new owners acquired Z Channel and have instituted an all-sports program. Apparently, Z Channel has completely stopped showing movies, and does not contemplate showing movies in the future.

ANALYSIS

1. Mootness

[1] We are faced with a threshold issue of mootness. The only claim remaining in this case is that alleged in Count One of the complaint. The only relief expressly requested in connection with that Count was declaratory and injunctive relief, to permit Z Channel to show licensed movies along with sports programming that is interspersed with commercials. Because Z Channel has changed its format and neither shows nor contemplates showing movies, its prayer for declaratory and injunctive relief is clearly moot. For this reason, HBO contends that the entire appeal should be dismissed for mootness. Z Channel, on the other hand, contends that it is entitled to

seek damages if it succeeds in proving its Count One claim, and that the case therefore is not moot. On this record, we agree with Z Channel.

[2] If Z Channel is entitled to collect damages in the event that it succeeds on the merits, the case does not become moot even though declaratory and injunctive relief are no longer of any use. *See Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 459 (1957). A case or controversy still exists because the parties are disputing whether enforcement of and insistence on the no-advertising agreements constituted an unreasonable restraint of trade. If Z Channel prevails, it may recover damages for loss of advertising revenue. Federal Rule of Civil Procedure 54(c) allows the district court to award damages if Z Channel proves facts entitling it to relief even though Z Channel never requested damages.

[3] It is clear that Z Channel did not foreclose relief in damages by failing to ask for them in its Count One prayer. "[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in the party's pleadings.*" Fed. R. Civ. P. 54(c) (emphasis added); *see also Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60, 66 (1978) ("a meritorious claim will not be rejected for want of a prayer for appropriate relief"); *Western District Council v. Louisiana Pacific Corp.,* 892 F.2d 1412, 1416-17 (9th Cir. 1989) (holding case not moot because court could grant remedy of rescission even though plaintiff had not requested this remedy); *Sias v. City Demonstration Agency,* 588 F.2d 692, 696 (9th Cir. 1978) (holding district court erred in concluding that it could not grant reinstatement because plaintiff failed to request such remedy); *Sapp v. Renfroe,* 511 F.2d 172, 176 n.3 (5th Cir. 1975) (plaintiff raises request for damages for first time

on appeal; court notes Rule 54(c) allows award of damages in this situation).

HBO asserts, however, that it is far too late for Z Channel to talk of damages now. It points out that we dismissed a portion of an appeal for mootness in *Dan Caputo Co. v. Russian River County Sanitation Dist.*, 749 F.2d 571, 574 (9th Cir. 1984), because only declaratory and injunctive relief had been requested and the moment had passed when those remedies might have been useful. We think that HBO reads too much into *Caputo*. In *Caputo* there was no indication that damages were sought even as late as appeal, or that damages would have been appropriate for that challenge by a non-bidder to a public bid-solicitation process. As we said, "There remains no effective relief which we can offer Caputo/Wagner." *Id.* The same situation prevailed in two other cases where we dismissed appeals because declaratory and injunctive relief had become moot; no damages were ever sought, and no case or controversy existed because the court was unable to grant effective relief. *See Fair v. EPA,* 795 F.2d 851, 854 (9th Cir. 1986); *Enrico's Inc. v. Rice,* 730 F.2d 1250, 1254 (9th Cir. 1984).

[4] Here, Z Channel now seeks damages,[4] and Count One of its complaint, construed favorably to it, alleges restraints that could have resulted in financial damage to Z Channel. We conclude, therefore, that the damages

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[4]Unlike the dissent, we do not read Z Channel's opening brief as disavowing any claim for damages. Z Channel merely states that it was not seeking damages "arising from antitrust violations that produce the breach of a pre-existing contract." Appellant's Opening Brief, p. 14. Z Channel's point is that it is not seeking the same kind of relief as that sought in *Newman*. The dissent takes the remarks out of context.

remedy is sufficiently before us to preclude a dismissal for mootness. We turn, therefore, to the merits.

II. The Merits: Antitrust Injury

A grant of summary judgment is reviewed de novo, *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990); *State Farm Fire and Casualty Co. v. Martin*, 872 F.2d 319, 320 (9th Cir. 1989). Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989); *Judie Hamilton*, 872 F.2d 919, 920 (9th Cir. 1989).

[5] The anticompetitive activity that Z Channel complains of in Count One occurred in response to Z Channel's decision, announced in early 1988, to carry advertising in connection with its sports broadcasts. Implementing that decision would have violated prohibitions on advertising contained in preexisting contracts between Z Channel and its distributors, and between those distributors and HBO. Much or all of the alleged harm to Z Channel arose either from the enforcement of those preexisting contract terms, or from the refusal to modify those terms in new contracts referencing the preexisting contracts. For that reason, the district court concluded that Z Channel's claim failed for lack of any showing of antitrust injury, under the rule announced in *Newman v. Universal Pictures*, 813 F.2d 1519 (9th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988). We conclude that the district court applied *Newman* too broadly, and we accordingly reverse.

Newman was a claim brought by Paul Newman, the actor, and George Roy Hill, a director, who had contracted to supply their services to Universal in the making of the feature films "Slapshot" and "The Sting." The contracts provided for Newman and Hill to receive a percentage of revenue from exhibition of the films. Subsequently, technological developments led to a market for the films in videocassettes. Newman and Hill claimed that Universal and other major studios had conspired to apply the profit participation clauses in their contracts in such a way as to minimize the amounts paid to Newman, Hill and other artists.

We upheld a dismissal of Newman's and Hill's action for failure to state a claim of antitrust injury. Crucial to our analysis was the fact that the only injury to competition that was alleged or urged was the competition for Newman's and Hill's services in making the two named films. We said:

> The subsequent conspiracy could not have affected the competition for Newman and Hill's services at the time the contracts were made. Furthermore, the alleged conspiracy could not have affected appellants' ability to negotiate with other studios for distribution of the videocassettes, because the existing contract covered distribution of the film in all forms. . . . Thus, if the alleged conspiracy did not restrain competition for Newman and Hill's services in "The Sting" and "Slapshot," there can be no resulting antitrust violation.

Id. at 1522.

[6] The defendants extract from *Newman* a broad rule that interpretations and applications of contracts that

preexist the anticompetitive activity cannot, as a matter of law, cause antitrust injury. The key, however, is not merely that Newman's and Hill's *contracts* predated the conspiracy; it was that the only *competition* alleged to be injured predated the conspiracy. When Newman and Hill signed contracts to perform in or direct "The Sting" and "Slapshot," the competition among movie producers for those services ended. A later conspiracy, whatever other damage it may have caused, could not injure that competition.

[7] It is true in the case below us that *some* competition ended when Z Channel entered contracts to exhibit certain movies on its channel. Competition among distributors to rent those movies to Z Channel for cablecasting at the specified times clearly ended with the signing of that contract. Any later conspiracy to enforce that agreement could not cause injury to the competition among distributors for sale of the contracted movies or times.

[8] But the present case involves two other forms of competition in existence when the defendants allegedly acted illegally. First, during the time when Z Channel was contemplating its inclusion of paid advertising during sports broadcasting, it was negotiating with distributors for licenses for new movies. Those negotiations involved competition among distributors to rent movies to Z Channel, and conversely, among cable channels (including Z Channel) to rent movies from distributors. Included (at least implicitly) in those negotiations for new licenses was Z Channel's proposal to advertise during sports broadcasting.

Those negotiations were conducted in the shadow of the preexisting "master" licensing agreements, but they were, nevertheless, negotiations for new contracts. The master licenses permitted subsequent modification of any term,

and the terms of the master license controlled only if new terms were not adopted by agreement of the parties.

[9] Thus, the competition between cable channels and distributors for the license rights to films was continuing when the distributors were insisting on retaining their "no-advertising" clauses in new licenses, and, more significantly, when HBO was insisting that the other distributors continue to insist upon those clauses in any new licenses they might grant. To the extent that these actions by HBO and the other distributors injured that competition, the requirements of causation and competitive injury to Z Channel have been met.

[10] Z Channel has also alleged injury to another, more general, area of competition in which it was participating at the time of the alleged antitrust violations — the struggle for competitive viability in the cable television market. Z Channel alleged that HBO coerced the distributor defendants to apply their licensing agreements with Z Channel to prevent Z Channel from advertising during its cablecasting of sports events. Second Amended Complaint para. 41. It further alleged that this action was taken so that "Z Channel, in the short run, will be a less effective and viable competitor to HBO and barred from entering the market for pay television offering both movie and sports programming, and, in the long run, would likely be eliminated as a competitor altogether. . . ." *Id.* at para. 46. Thus,

> Defendants' interpretations and applications of their licensing agreements with plaintiff Z Channel Limited Partnership would have injurious effects on competition, including the diminishment of competition among and between pay television services and a restriction

> on consumer choice among pay television services and different pay television programming.

Id. at para. 53.

[11] We think it clear from these allegations that Z Channel is asserting an injury to competition that postdates the anticompetitive activity of which it complains — the actions by HBO and the other defendants to enforce the "no-advertising" clauses in their existing licensing contracts, and to retain those clauses in new contracts. It may be true, as to those licenses already negotiated, that Z Channel had prospectively limited its future competition with other cable services when it entered the license agreements with "no-advertising" clauses.[5] However, as to those licenses for which Z Channel was continuing to negotiate, it was clearly competing with other cable channels, not only for the rights to certain films, but also for survival and success in the cable television market.

Those distributors who, of their own independent choice, elected to enforce their "no-advertising" restrictions, or insisted on retaining those restrictions in subsequent licenses were doubtless entitled to do so. Assuming the legality of the contract,[6] its collateral effect of limit-

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[5]Even as to those licenses already granted, all practical prospect of competition by means of advertising had not ended. Z Channel has alleged and offered some evidence to support the fact that it was negotiating with the distributors to relax their "no-advertising" restrictions. Indeed, two distributors did so, and they are not defendants in this action.

[6]Z Channel contends that the licensing agreements containing restrictions on advertising were themselves contracts in restraint of trade, in violation of section 1 of the Sherman Act. The district court did not rule on that point, nor do we. Of course, the contracts were ones to which Z Channel was itself a party.

ing competition between Z Channel and other cable services would have been permissible.

[12] Part of Z Channel's case, however, is that the distributors were not free to relax their restrictions and permit Z Channel more vigorously to compete with other cable services, because HBO in its capacity as a competing cable service[7] coerced the distributor defendants to enforce their agreements against Z Channel. According to Z Channel, HBO could accomplish this result because of its dominant market position and because its own contracts with distributors, at HBO's insistence, contained clauses prohibiting distributors from licensing films covered by the HBO licensing agreement to other services if they advertised.[8] This action by HBO and the acquies-

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[7]HBO also acted as a distributor, licensing Z Channel to show certain movies to which HBO owned the rights. With regard to restrictions it imposed on advertising by direct licensing agreement between itself and Z Channel, HBO is in the same position as the producer-distributor defendants.

[8]Indeed, there is evidence in the record supporting the inference that HBO was insisting on a broader restriction on licensing to advertisers than contained in its contracts with the other distributors. Those contracts prohibited HBO's distributors from licensing the *same movies* they had licensed to HBO to other cable services that carried advertising. *See, e.g.*, ER 154, Exh. B at 32. But the communications from the other distributors to Z Channel indicate that HBO was insisting that if HBO were to continue licensing *any movies* from the distributors, those distributors could license *no movies* to a cable service that carried advertising, regardless of whether there was overlap in the movies rented. *See, e.g.*, ER 3, Exh. D (Mar. 3, 1988 letter from Twentieth Century Fox to Z Channel) ("[T]his confirms that 20th Century Fox cannot, under any circumstance, license films in the Pay TV window to any subscription Pay TV service which contains advertising."); ER 5, at 13-14, para. 33 (Declaration of Joseph Cohen) ("[20th Century Fox executive] had received a 'bad letter' from HBO and would have to 'toe the line.' She explained that

cence of the distributor defendants, enforced with the aid of HBO's contracts with the distributors, is the anti-competitive activity of which Z Channel complains.[9] And that conduct was clearly capable of causing an injury to the competition between Z Channel and the other cable services, including HBO.

[13] The defendant distributors contend that each acted wholly independently in enforcing its "no-advertising" clause against Z Channel. They offered evidence in support of that position. Z Channel, however, offered contradictory evidence that HBO threatened action against the distributors under HBO's contracts if the distributors did not enforce and retain the "no-advertising" restrictions against Z Channel, and that the distribu-

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this meant Fox could not allow Z Channel to exhibit Fox films if Z Channel were to contain any advertising. She added, 'Fox doesn't want to be the bad guys. We would love to keep giving Z Channel product but the advertising issue is of a big concern to HBO' ").

[9]The defendants contend that Z Channel's Count One, so construed, depends upon a showing of conspiracy and any such showing is foreclosed because Z Channel abandoned its conspiracy count, Count Two, and it was dismissed with prejudice. We do not construe Z Channel's abandonment of its Count Two conspiracy claim as precluding any showing of joint action in support of its Count One claim. Z Channel has not helped to clarify matters at all by arguing that its Count One claim is a Section 1 "contract" claim and that contracts are mutually exclusive of conspiracies. It is difficult to understand how a contract in restraint of trade can be entered and enforced without agreement between parties. We also note that Count One alleges that the contracts between the distributors and Z Channel were contracts in restraint of trade, but does not directly allege that the contracts between HBO and the distributors, that forbade the distributors to license to operators who carried advertising, were contracts in restraint of trade. We do not regard that omission as fatal to Count One. The allegations of coercion of the distributors by HBO were broad enough to encompass use of its contract restrictions.

tors responded to that pressure. We cannot say as a matter of law that there is no triable issue whether HBO's actions, acting upon the distributors, caused competitive injury to Z Channel.

[14] We conclude, therefore, that Z Channel's case is not foreclosed by *Newman,*[10] because the anticompetitive activity of which Z Channel complains could have caused injury to competition between Z Channel and other cable services.[11] Having concluded that *Newman* does not con-

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[10]It also is not foreclosed by *Orion Pictures Distribution Corp. v. Syufy Enterprises,* 829 F.2d 946 (9th Cir. 1987), the only other case in this circuit to apply *Newman.* In *Orion,* we held that a breach of contract after the defendant had achieved monopoly power did not constitute "antitrust injury," for a Sherman Act section 2 monopolization claim because the injury to competition in that case (allegedly acquiring monopoly power) had ended before the defendant's injury (loss of revenue from the broken contract) occurred. *Id.* at 948-49.

[11]Nor do we regard this as a case like *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.,* 890 F.2d 139 (9th Cir. 1989), which presented the question whether a plaintiff who might be viewed as peripheral to the competition in issue had antitrust standing and could claim antitrust injury. Here, Z Channel is alleging an injury to competition between itself and other cable producers. Assuming that Z Channel can prove its claims, it has no difficulty meeting the five-part test set forth by the plurality in *Dick:* the factors of directness of the injury, lack of more appropriate plaintiffs, and nature of the injury to it as a participant in the competitive market, easily bring Z Channel within the *Dick* plurality test. *See id.* at 146-48. The difference between *Newman* and the present case is particularly well captured in the statement by the *Dick* plurality that "[m]ere injury as a landlord or lessor entitled to royalties would not by itself be the kind of injury to competition that the antitrust laws are designed to prevent. The requirement that the alleged injury be related to anticompetitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors.' " *Id.* at 148, (quoting *Bhan v. NME Hosp., Inc.,* 772 F.2d 1467, 1470 (9th Cir. 1985)).

trol this case, we decide nothing further. The district court did not rule on the legality of the contracts in issue, the reasonableness of any restraints on trade, or any other possibly decisive issues, nor do we. We reverse simply because the district court's conclusion that *Newman* controls was in error, and we remand for further proceedings. Nor, for lack of a sufficient record, do we address the asserted deficiencies in plaintiff's standing that were likewise not ruled on in the disposition of the motion for summary judgment.

REVERSED AND REMANDED.

KOZINSKI, Circuit Judge, dissenting:

This case is dead, procedurally as well as substantively. By breathing new life into it, my colleagues create much business for the lawyers but ill-serve the interests of the parties and the cause of sound judicial administration.

I

A. The Federal Rules of Civil Procedure are clear as mountain spring water: All complaints must include "a demand for judgment *for the relief the pleader seeks.*" Fed. R. Civ. P. 8(a)(3) (emphasis added). Z Channel's complaint does not demand money damages; it seeks only declaratory and injunctive relief, neither of which can now be granted. There's nothing left; we must dismiss.

The majority reaches the contrary conclusion by focusing on Fed. R. Civ. P. 54(c). But my colleagues are looking at the wrong end of the elephant. Fed. R. Civ. P. 54(c) governs final judgments; parties who have litigated a case to completion are entitled to all available relief. Rule 54(c) only applies, however, *after* the case has been fully litigated; it says nothing about what a plaintiff must

put in its complaint in order to get to judgment. That issue is governed by Rule 8(a)(3), which has a lower number because it comes into play long before Rule 54(c). If plaintiff does not satisfy Rule 8(a)(3) by stating a claim for available relief, it never gets to Rule 54(c).

The long and short of it is that the majority has rendered Fed. R. Civ. P. 8(a)(3) meaningless in contested cases. If Rule 54(c) automatically cures any and all failures to state a prayer, Rule 8(a)(3) becomes nothing more than friendly advice. It is, of course, totally inappropriate to construe two parts of a statute — or two rules of civil procedure — so that one will cancel out the other. *See Nieto v. Ecker,* 845 F.2d 868, 873 (9th Cir. 1988); 2A N. Singer, *Sutherland's Statutory Construction* § 46.06 (4th ed. 1984). Yet, that is what the majority has done today.

B. My colleagues leap over two hurdles with a single bound by also ignoring the rule that claims may not be raised for the first time on appeal. The fact of the matter is, Z Channel never said boo in the district court about damages under count I. The majority nonetheless concludes that the issue is "sufficiently before us," majority at 8, because Z Channel is raising the issue now.[1] But now

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[1]Whether plaintiff is in fact raising it even now is a highly debatable point. Z Channel has repeatedly told us it is *not* seeking damages. In its opening brief, Z Channel wrote:

> *[P]laintiff is not seeking money damages* arising from antitrust violations that produce the breach of a pre-existing contract. Instead, the injury Z Channel alleges and is trying to stop arises from defendants' continued unjustifiable enforcement of a contractual restriction against advertising, which adversely affects Z Channel's current and future ability to compete. . . .

is far too late, as we are in the court of appeals, not the district court. It goes without saying that to preserve an issue for appeal, one must first present it to the trial court; all issues not raised below are deemed waived. *See Image Technical Service, Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 615 n.1 (9th Cir. 1990); *United States v. Whitten*, 706 F.2d 1000, 1012 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); 10 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2716, at 650-54 (2d ed. 1983). This is the approach adopted by the Seventh Circuit in *James Luterbach Constr. Co. v. Adamkus*, 781 F.2d 599, 603 (7th Cir. 1986), and the Fifth Circuit in *H.K. Porter Co. v. Metropolitan Date County*, 650 F.2d 778, 782 (5th Cir. 1981), *cited in James Luterbach*, 781 F.2d at 603. The majority creates a conflict without so much as a nod to our sister circuits.[2]

The case for waiver is stronger here than it was in *James Luterbach* and *H.K. Porter*. In those cases, the plaintiff neglected to include any prayer for damages in the initial complaint, *id.;* the failure may indeed have been an oversight. But damages were not overlooked or forgotten here. Z Channel's complaint, carefully tailored by experienced counsel, requested damages for some claims but not for others. *Compare* Second Amended Complaint

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Appellants's Opening Brief at 14 (emphasis added). Z Channel stuck to this position with monotonous consistency: "[Z Channel] is *not claiming as its antitrust injury specific dollar amounts of damage* arising from defendants' breach of pre-existing contracts . . . ." *Id.* at 19 (emphasis added); *see also id.* at 21 n.14. Nowhere does plaintiff make the claim that the majority attributes to it, nowhere that is until its response to the suggestion of mootness.

[2]While, as my colleagues note, the Fifth Circuit had reached the contrary conclusion in *Sapp v. Renfroe*, 511 F.2d 172, 176 n.3 (5th Cir. 1975), that court has since revisited the issue and placed itself in line with the Seventh Circuit. *See H.K. Porter*, 650 F.2d at 782.

¶¶ 65-66 (seeking injunctive relief and damages), *with id.* ¶¶ 54-56 (seeking only injunctive and declaratory relief). Z Channel then voluntarily dismissed the count that included a prayer for damages and proceeded only on its claim for declaratory and injunctive relief.

If Z Channel, a well-heeled litigant represented by one of the giants of the antitrust bar, is not bound by its litigation choices, who is? How can the majority reconcile its decision with *White v. McGinnis*, 903 F.2d 699 (9th Cir. 1990) (en banc), *cert. denied,* 111 S. Ct. 266 (1990), where we held that an incarcerated civil rights plaintiff, who complied fully with the Federal Rules of Civil Procedure, nevertheless abandoned his *constitutional* right to a jury by failing to reassert it at trial? I see no reason to cut Z Channel more slack than we did poor Mr. White.

By holding that Z Channel has a viable claim for damages, the majority in effect grants Z Channel leave to amend its pleadings to include such a claim, inverting the roles of the trial and appellate courts. Under the Federal Rules and our case law, the decision whether to permit an amendment belongs to the district judge. *See* Fed. R. Civ. P. 15(a). Our job is only to review for abuse of discretion. *Thomas-Lazear v. FBI,* 851 F.2d 1202, 1206 (9th Cir. 1988). The majority's elephant is not merely backwards, it's upside down.

II

The majority engages in judicial necromancy yet again when it resurrects a substantive theory Z Channel long ago let expire, bringing this case back from the dead not once but twice.

A. This case got started because Z Channel wanted to include advertising in its programming but ran into a

problem: Movie distributors refused to license films to Z Channel unless it agreed not to; they also refused to release Z Channel from the no-advertising clauses in existing licenses. The reason for this refusal is no mystery; it is well documented in the record.

In general, distributors insist on no-advertising restrictions in pursuit of a marketing strategy with a fancy name, "sequential window licensing," and a straightforward goal — making more money. Declaration of Chase Carey, Senior Vice President of Twentieth Century Fox Film Corp., SER 57 at 164. Here's how it works: At each stage of a film's life (in each "exhibition window," as the denizens of Hollywood would say), the distributor licenses the film to one type of exhibitor only. A major release starts out in its "first run," playing in a few, select theaters. When the film gets older and interest dies down, the distributor licenses it to additional theaters at a lower rate for a "second run" or "roll out" (*e.g.* "now showing at theaters and drive-ins everywhere"). *See United States v. Syufy Enterprises*, 903 F.2d 659, 665 n.7 (9th Cir. 1990). Still later the film becomes available on videotape; eventually it is shown on pay t.v. — television supported entirely by subscription fees and not by advertising. Last of all, it appears on stations that include advertising (free cable and network television).

By licensing films one window at a time, the distributor accomplishes what economists call price discrimination.[3] *See* R. Posner, Economic Analysis of Law 259-260 (3d ed. 1986); A. Alchian & W. Allen, University Economics 125-27 (3d ed. 1972). Price discrimination maximizes film

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[3]Some forms of price discrimination are prohibited under section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). No Robinson-Patman violation is claimed here.

revenues without restricting supply, but it only works to the extent film distributors are able to keep the exhibition windows separate. *See id.* at 126. Theaters are willing to pay premium license fees for a film only if everyone who wants to see it immediately must pay full price; few patrons would pay $7 a ticket if they could rent the same movie for $3.

This case involves the same phenomenon as to a different exhibition window. Subscription television companies are willing to pay top dollar for a license only if they know viewers can't see the same movie on another channel for free. Hence, distributors generally include no-advertising restrictions in their licenses to pay t.v. exhibitors. Similarly, when HBO buys a license, it insists that licenses to other exhibitors also contain no-advertising clauses; that way HBO doesn't pay a bundle only to find its would-be patrons watching the same film on another channel for nothing.

B. These restrictions are at the heart of Z Channel's complaint: The film distributors insisted on their no-advertising clauses and HBO stood on its right not to have the movies it exhibits licensed to stations supported by advertising. So Z Channel sued. First, it claimed that HBO's licenses with distributors and the distributors' insistence on no-advertising clauses were unreasonable restraints of trade. That theory is still in the case, assuming there's a case left at all; and as the majority correctly points out, it's not barred by *Newman v. Universal Pictures*, 813 F.2d 1519 (9th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988).[4] So far, so good.

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[4]In *Newman*, the plaintiffs contended that various studios had conspired to interpret contracts so as to deny the plaintiffs royalties from videotape distribution of movies they had worked on. We held that they had not alleged antitrust injury, having failed to show

The majority, however, goes on to address another claim: that HBO coerced distributors into keeping the no-advertising restrictions. That claim simply isn't part of the case anymore. Who says so? Z Channel, for one:

> [The only remaining count] attacks a licensing agreement and . . . is limited to licensing agreements constituting an unreasonable restraint of trade . . . .
>
> No matter how much you examine [that count], your honor, you will not find the word boycott, you will not find the word conspiracy, and you will not find the word[s] concert of action. *[It] charges that the contracts themselves, the licensing agreements and the enforcement of those licensing agreements violates [Sherman Act] section 1.*

Transcript of Oral Argument before the District Court, RT 7, (Sept. 22, 1988) (emphasis added).

Z Channel abandoned the coercion theory with good reason: There's not a morsel of evidence to support it. All

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injury to competition or themselves as competitors. *Newman*, 843 F.2d at 1522. Here, Z Channel alleges that it was unable to compete with HBO for subscribers and cable space because HBO had, through its contracts with distributors, prevented Z Channel from acquiring the raw materials (*i.e.* movie licenses) it needed to compete. *Cf.*, *e.g.*, *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 325-27, 333 (1961) (challenge to reasonableness of requirements contract for coal on grounds it foreclosed the supply of coal in the relevant market). As such, it has alleged both injury to competition and harm to itself as a competitor — in short, antitrust injury. Whether it can establish an antitrust violation on the basis of the no-advertising clauses in the distribution contracts is another story.

the evidence Z Channel managed to muster were the contracts themselves. As Z Channel's counsel explained:

> What we have here are agreements between HBO and the defendant studios which have been enforced against Z Channel, that is the essence of this case and . . . that is why we are still in court. . . . What we are talking about is whether we qualify under section 1 by having alleged that the contracts between HBO and the defendants precluding their relicensing pictures to competitors of HBO which would permit those competitors to advertise, whether that contractual restraint standing alone and . . . viewed cumulatively reached a level of an unreasonable restraint of trade.

Id. at 8-9.

But why take his word for it? A quick look at the record confirms that the coercion theory just doesn't hold water. According to MGM/UA, one of the alleged victims of coercion, "HBO did not force us into [our] deals with it. . . . In fact, HBO's license with us expressly provides for our right to render that license non-exclusive (subject, of course, to a substantial reduction in the license fee paid to us by HBO)." Declaration of Anthony Lynn, Executive Vice President, International Television and Worldwide Pay Television of MGM/UA Telecommunications, Inc., SER 20, at 98. And what about Twentieth Century Fox? "Fox's decision [to not license movies to Z Channel if it advertised] was not due to any alleged pressure from or coercion by HBO . . . ." Carey Declaration, SER 57 at 191.

Instead, film distributors refused to modify their agreements because doing so would have blurred two exhibition

windows, decreasing revenue. "The plain and simple fact is that Fox has independently, and for valid business and economic reasons . . . determined to enforce its purposefully negotiated rights under the Fox-Z Channel License Agreements. It has done so to preserve . . . its Sequential Window Licensing Strategy . . . to maximize Fox's total revenues from the licensing of all of its Theatrical Films." Carey Declaration, SER 57 at 192-93. As Anthony Lynn of MGM/UA Pictures explained, licensing to a station that includes advertising while pay t.v. stations are willing to buy licenses is like "turning gold into lead." Supplemental Lynn Declaration, SER 47 at 139-40; *see* Declaration of Alan Cole-Ford, Former Vice President of Video Distribution, Paramount Pictures Corporation, SER 39 at 133 (Paramount's use of no-advertising clauses designed to maximize revenues); Lynn Declaration, SER 20 at 96 (enforcement of windows is to maximize the value of the films); Declaration of Edward Bleier, President of Warner Bros. Domestic Pay-TV, Animation & Network Features, SER 48 at 150-51 (regardless of contractual restrictions imposed by the Warner-HBO agreements, Warner believed that permitting Z Channel to include commercial advertising in its format would harm Warner's [window] marketing strategy and economic interests).[5]

C. The majority nonetheless points an accusatory finger and pronounces the evidence sufficient to support a

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[5]The testimony of the alleged victims is particularly damning in light of their obvious economic interests: In the absence of an agreement between HBO and the defendant distributors to share monopoly rents — an agreement everyone agrees cannot be proven — the distributors have nothing to gain and everything to lose by helping HBO destroy its competitors. HBO would become a monopsonist, the only buyer in the pay t.v. window; the distributors might well be at its mercy.

coercion theory. Majority at 5419-21. But what facts do my colleagues recite? That Twentieth Century Fox received "a bad letter" from HBO, majority at 5419-20 n.8, and subsequently refused to license Z Channel any films without a no-advertising clause. From that the majority infers that HBO threatened to boycott Fox if it licensed *any* films to Z Channel — even films for which HBO hadn't taken a license. *Id.* But all HBO's letter does is remind Fox of its contractual obligations:

> As you are no doubt aware, HBO has licensed from you the right to exhibit motion pictures during periods when those pictures will not be available on any service or channel which carries advertising. . . . [C]ontemporaneous appearance of programming on the HBO services and on an advertiser supported service would substantially lessen the value, and compromise one of the most distinguishing features, of the HBO services. Consequently, the Agreement prohibits such contemporaneous appearance.

Accordingly, please be advised that should Z Channel proceed with its announced plans to include such advertising on its service, and should Z Channel exhibit any motion picture *licensed to us. . .*, HBO shall deem such exhibition a material breach [of contract].

Letter from HBO to 20th Century Fox, February 29, 1988, ER 142, Exhibit G (emphasis added). There's absolutely no mention of movies not already under license to HBO; there's no coercion. All HBO did was to stand on its contracts. If there's any reason to remand to the district court, it's for a determination whether HBO's

contracts amount to an unreasonable restraint of trade, not for trial on a coercion theory.[6]

Z Channel wisely gave up its coercion claim when it discovered there was no evidence to support it.[7] The majority would do well to respect that informed decision rather than encourage the parties to litigate a dispute that no longer exists.

CONCLUSION

Once in a while big, interesting, difficult cases implode, leaving nothing for us to decide. When this happens, we should sweep aside the rubble, not compress it until it turns into a judicial black hole that sucks up productive resources of cosmic proportions. Defying a clear rule of procedure, creating an inter-circuit conflict and resurrecting a legal theory long ago abandoned by the parties makes no sense to me at all. This case is dead. R.I.P.

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[6]The defendants did not argue in support of summary judgment that the contracts were reasonable as a matter of law and the district court did not address that issue; accordingly, neither do I.

[7]Z Channel's decision was particularly well-advised considering its evidentiary burden: It had to exclude the possibility of independent action; even proof that the distributors' conduct came in response HBO's complaints would not have been enough. *See Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984).

CA No. 88-6576

IN THE

United States Court of Appeals

FOR THE

Ninth Circuit

D.C. No. CV-88-1633-R

ORDER

Z CHANNEL LIMITED PARTNERSHIP,
Plaintiff-Appellant,

VS.

HOME BOX OFFICE, INC.; MGM/UA TELECOMMUNICATIONS, INC.; PARAMOUNT PICTURES CORPORATION; TWENTIETH CENTURY FOX FILM CORPORATION; WARNER BROTHERS, INC.
Defendants-Appellees.

BEFORE: CANBY, KOZINSKI AND THOMPSON, CIRCUIT JUDGES.

A majority of the panel has voted to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

CASE NO. CV-88-01633-MLR

United States District Court

Central District of California

ORDER AND FINAL JUDGMENT ENTERED UNDER
FED. R. CIV. P. 54(b)
DATE: October 13, 1988
TIME: 1:30 p.m.
CTRM: 8

Z CHANNEL LIMITED PARTNERSHIP,
Plaintiff,

vs.

HOME BOX OFFICE, INC., MGM/UA TELECOMMUNICATIONS, INC., PARAMOUNT PICTURES CORP., TWENTIETH CENTURY FOX FILM CORP., WARNER BROS., INC. and SHOWTIME/THE MOVIE CHANNEL, INC.
Defendants.

HOME BOX OFFICE, INC.,
Counterclaimant,

v.

AMERICAN SPECTACOR TELEVISION PROGRAMMING COMPANY; Z CHANNEL LIMITED PARTNERSHIP; JOSEPH M. COHEN INC. AND ROCK Z, INC.,
Counterdefendants.

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This matter came to be heard before this Court on September 22, 1988 on the motion of defendant Home Box Office, Inc. (joined in by each of the studio defendants) for summary judgment dismissing the complaint and the motion of plaintiff Z Channel Limited Partnership for summary judgment on HBO's counterclaims. Upon consideration of the papers submitted in support and in opposition to said motions, oral argument and the record in this action:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that

1. Defendants' motion for summary judgment dismissing Plaintiff's Second Amended Complaint be, and it hereby is, granted as to Counts One and Two on the merits.

2. Counts Three and Four of Plaintiff's Second Amended Complaint be, and they hereby are, dismissed pursuant to *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966).

3. Plaintiff's motion for summary judgment dismissing HBO's counterclaims be, and it hereby is, denied.

4. Notwithstanding the continued pendency of counterclaims brought by defendants HBO and Warner Brothers, the Court hereby finds that there is no just reason for delay and it directs that final judgment shall be entered dismissing Counts One and Two of Plaintiff's Second Amended Complaint.

5. Taxation of costs, including attorneys fees if any, shall be deferred pending the disposition of any appeal taken by plaintiff.

6. Proceedings on the Counterclaims of HBO and Warner Brothers shall be stayed pending the disposition of any appeal taken by plaintiff.

DATED: October 14, 1988

_____

UNITED STATES DI TRICT JUDGE

Presented by:

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

By_____

Darrel J. Hieber
Attorneys for Defendant/
Counterclaimant Home
Box Office, Inc.
on behalf and with authorization of counsel
for plaintiff and counsel
for all defendants

PROOF OF SERVICE

The undersigned certifies that:

I am and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, State of California, over the age of 18 years and not a party to or interested in the within action, and that my business address is 611 West Sixth Street, Suite 2800, Los Angeles, California. I further certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I had the foregoing document served on the below-listed parties to this action by depositing a copy of same, enclosed in a sealed envelope with first class postage prepaid thereon, in the United States mails at Los Angeles, California on October 19, 1988, addressed as follows:

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